Office
JUL 2
1982
ALEXANDER L. STEVAS,
CLERK

82-114

NO:

in the Supreme Court of the United States

OCTOBER TERM 1982

OCAR OLIVA-CANTU,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DONALD I. BIERMAN, ESQUIRE
Counsel of Record
BENEDICT P. KUEHNE, ESQUIRE

BIERMAN, SONNETT, BEILEY & SHOHAT, P.A.
Suite 500
200 Southeast 1st Street
Miami, Florida 33131
(305) 358-7477

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision below affirming the trial judge's refusal, despite a defense request, to instruct the jury on the permissible use of co-conspirator hearsay evidence conflicts with other appellate decisions and deprives OLIVA-CANTU of due process?

2. Whether the decision below, affirming the convictions of OLIVA-CANTU, is contrary to prevailing law and results in a deprivation of OLIVA-CANTU's constitutional rights, where the evidence did not sufficiently establish OLIVA-CANTU's criminal liability in a dual object conspiracy?

3. Whether Petitioner is deprived of fundamental fairness when the prosecutor is permitted, over defense objection, to suggest to the jury that it is the Petitioner who is

responsible for the community drug problem and that waging battle against narcotics traffickers must begin with Petitioner's conviction?

4. Whether a defendant in a criminal case can be sentenced to a term which exceeds that allowed as punishment for the criminal activity proved at trial, without running afoul of constitutional guarantees?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family, his co-defendants in the trial court, and the United States of America.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	
I. The decision below affirming the trial judge's refusal, despite the defense request, to instruct the jury on the permissible use of co-conspirator hearsay evidence conflicts with other appellate decisions and deprives OLIVA-CANTU of due process.	21
II. The decision below affirming the convictions is contrary to prevailing law and results in a deprivation of OLIVA-CANTU's constitutional rights where the evidence did not establish OLIVA-CANTU's criminal liability for a dual object conspiracy.	27
III. OLIVA-CANTU was deprived of fundamental fairness when the prosecutor was permitted, over defense	

objection, to suggest to the jury that it is the defendant who is responsible for the community drug problem and that the defendant's conviction is the right start in the war on drugs. 31

IV. A defendant in a criminal case cannot be sentenced to a term which exceeds the maximum allowable punishment. 34

CONCLUSION 36

CERTIFICATE OF SERVICE 37

APPENDIX 1A

TABLE OF AUTHORITIES

Page

Berger v. United States,
295 U.S. 78 (1935).....33

In Re Winship,
397 U.S. 358 (1970).....29

United States v. Colson,
662 F.2d 1389 (11th Cir. 1981)....35

United States v. Garcia,
655 F.2d 59 (5th Cir. 1981).....29

United States v. Garza,
608 F.2d 659 (5th Cir. 1979).....33

United States v. Giese,
597 F.2d 1170 (9th Cir.), cert.
denied, 444 U.S. 979 (1979).....23

United States v. Gomez-Geraldo,
652 F.2d 452 (5th Cir. 1981).....35

United States v. Harbin,
601 F.2d 773 (5th Cir.), cert.
denied, 444 U.S. 954 (1979).....30

United States v. Horton,
646 F.2d 181 (5th Cir. 1981).....25

United States v. James,
590 F.2d 575 (5th Cir.)
(en banc), cert. denied,
442 U.S. 917 (1975).....22

United States v. Martinez,
514 F.2d 334 (9th Cir. 1975).....33

United States v. Menchero,
677 F.2d 116 (11th Cir. 1982)...2, 7

AUTHORITIES Continued

Page

United States v. Miranda,
593 F.2d 590 (5th Cir. 1979).....33

United States v. Murray,
618 F.2d 892 (2d Cir. 1980).....35

United States v. Nickerson,
669 F.2d 1016 (5th Cir. 1982).....33

United States v. Pool,
660 F.2d 547 (5th Cir. 1982).....27

United States v. Ruppel,
666 F.2d 261 (5th Cir. 1982).....27

United States v. Sisca,
503 F.2d 1337 (2d Cir. 1974).....30

United States v. Starks,
515 F.2d 112 (3d Cir. 1975).....35

United States v. Whitley,
670 F.2d 617 (5th Cir. 1982).....25

OTHER AUTHORITIES

U.S. Constitution
Amendment V.....3

21 U.S.C. §841.....3

21 U.S.C. §843(b).....3

21 U.S.C. §846.....4

28 U.S.C. §1254(1).....2

AUTHORITIES Continued

Page

Federal Rules of Evidence
Rule 801.....23

Devitt and Blackmar
§27.05 (3d ed. 1977).....25

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

OSCAR OLIVA-CANTU,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, OSCAR OLIVA-CANTU, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Eleventh Circuit entered in Case Number 80-5530 on April 26, 1982, which affirmed the judgment of the United States District Court for the Southern

District of Florida. United States v. Menchero, 677 F.2d 116 (11th Cir. 1982).

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reproduced in the Appendix hereto and is reported as United States v. Menchero, 677 F.2d 116 (11th Cir. 1982). The Court of Appeals denied the petition for rehearing in a per curiam order dated June 8, 1982, which is also reproduced in the Appendix. The District Court did not render any written opinions specifically directed to the questions presented in this certiorari petition.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the order on rehearing of the Eleventh Circuit. A co-appellant in the

court below, Jose Piniero, has also sought certiorari review by separate petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property without due process of law...

Title 21 U.S.C. §841:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;...

Title 21 U.S.C. §843(b):

> (b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate

offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

Title 21 U.S.C. §846:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

OSCAR OLIVA-CANTU and seven others were charged by a ten count indictment with various drug offenses. Specifically, OLIVA-CANTU was charged in count 1 with conspiracy to "possess with intent to distribute and to distribute" cocaine and marijuana, in violation of 21 U.S.C. §846; counts 6 and 9 alleged that OLIVA-CANTU used telephone facilities on March 11 and March 23, 1978 to facilitate a conspiracy to distribute cocaine, contrary to 21 U.S.C. §843(b). OLIVA-CANTU was not charged in any other counts.

Prior to trial, the indictment was dismissed as to three defendants. Trial of the remaining defendants were severed into two separate proceedings. The trial of OLIVA-CANTU and Gloria Menchero was held on March 18 through March 28, 1980, resulting in a jury

finding of guilt as to counts 1 and 6 for OLIVA-CANTU; he was acquitted of count 9. Menchero was convicted of counts 1 and 2. On November 3, 1980, OLIVA-CANTU was sentenced to a period of incarceration for nine (9) years on count 1, to be followed by a consecutive term of incarceration for three (3) years on count 6. A total fine of $30,000 was also imposed. Menchero received concurrent terms of three years incarceration on each count, followed by a three-year special parole term on count 2.

The two other remaining defendants, Jose Piniero and Rudolfo Rodriguez Gallo, proceeded to a jury trial on May 1, 1980. On May 9, 1980, the jury returned verdicts finding Piniero guilty of counts 1, 7, and 8. Gallo was convicted of counts 1, 2, and 10.

All defendants who proceeded to trial appealed their convictions. The appeals were consolidated by order of the appellate court. A per curiam affirmance was entered by the Eleventh Circuit on April 26, 1982. United States v. Menchero, 677 F.2d 116 (11th Cir. 1982). In addition to OLIVA-CANTU, Piniero has sought review in this Court.

The factual proceedings involved in this case can be separated into two independent areas. The first of the divisions involves a recitation of the facts surrounding the events leading up to the filing and ultimate denial of defense motions to suppress evidence. The latter area concerns the factual development elicited during the pre-trial James hearing and the subsequent trial. For ease of the Court and parties in reviewing this case, the factual statement is appropriately

separated into these two components.

1. The Motion to Suppress

On February 10, 1978, an order permitting the installation of a telephone wiretap at the residence of Carlos Quesada was obtained from a Florida Circuit Court Judge. Upon a challenge to that wiretap in a Florida criminal proceeding, a State Circuit Judge found the confidential informant, whose information provided the basis for the wiretap application, to be unreliable. Finding the remainder of the application to be deficient when considered apart from the excised portion, the judge granted the defense motion to suppress.

The evidence seized as a result of the wiretap then became the basis for a federal prosecution. After lengthy evidentiary hearings on motions to suppress filed by all defendants, the

United States Magistrate filed his report recommending that the motions to suppress be granted; the Magistrate found that the affiants to the wiretap application knowingly and intentionally included materially false statements in the affidavits. In a supplemental report, Magistrate Shapiro declared that the affidavit did not set forth sufficient facts to establish probable cause. Upon the filing of a government petition to review the Magistrate's recommendation, the trial judge held a de novo hearing and denied the motions to suppress.

2. The Trial Proceedings

In October 1977, an investigation into the affairs of suspected drug dealer Carlos Quesada began. On February 10, 1978, Raul Martinez, a police officer with the City of Miami Police Department, applied for

an order authorizing a telephone intercept at the Quesada residence. Pursuant to the order, interception of Quesada's telephone commenced on February 21, 1978, and continued through April 6, 1978, during which time 1800 phone calls were made.

The evidence utilized at the trial of OLIVA-CANTU consisted of selected tapes and transcripts of recorded conversations and the testimony of Quesada, the former principal defendant who became the key government witness. The government introduced four recordings during the pre-trial James hearing to be used as a foundation to determine the admissibility of co-conspirator hearsay statements. At trial, the government's case involved twenty-five tapes and transcripts. Of these taped conversations, only the four utilized at the James hearing contained

the conversations of OLIVA-CANTU. The remaining tapes involved conversations of other co-defendants. The government contended, during both the James hearing and at trial, that numerous words which were used by the participants to the taped conversations were code words meaning cocaine and other controlled substances.

(a) The James Hearing

The proof introduced at the pre-trial James hearing by the government to establish by independent evidence that a conspiracy existed and that OLIVA-CANTU was a member of that conspiracy, consisted of four tape recorded conversations and the testimony of Carlin Quesada. Call #613, between OLIVA-CANTU and Quesada, was summarized by police officer Robert Agras. Using his own interpretation of the words and phrases contained in the conversation,

Agras stated that OLIVA-CANTU and Quesada were talking about money owed from a prior contraband sale and that OLIVA-CANTU owed money to Rudolfo Rodriguez Gallo. However, there was no relationship shown on the tape between the money owed and any particular drug transaction.

Call #1204 is between OLIVA-CANTU and Quesada. OLIVA-CANTU tells Quesada to come to his son's house where he has a "very pretty thing". This phrase is interpreted by the officer as meaning a good percentage of contraband. The officer, however, could not positively state what kind of drug was meant.

Call #1237, between OLIVA-CANTU and Quesada on March 24, 1978, is a conversation wherein OLIVA-CANTU makes arrangements to meet Quesada at 10:00 for the purpose of exchanging

something. There is mention of a leaf in this conversation, which the witness interprets as meaning contraband. Finally, call #1238, again between OLIVA-CANTU and Quesada on March 24, 1978, arranges a meeting between the two men for payment of money. However, OLIVA-CANTU advises that he is going to be at his lawyer's office to discuss his divorce and immigration papers. The phrase "pretty little thing" is again used in conversation, but those words, according to the witness, do not necessarily mean contraband.

Carlin Quesada testified as the next James hearing witness. According to Quesada, he and co-defendant Rudolfo Rodriguez Gallo were partners in a cocaine and marijuana enterprise between April 1977 and November 1978. Quesada had received information that Gallo was separately

dealing in marijuana with OLIVA-CANTU, but did not have any firsthand knowledge of that. Quesada's involvement with OLIVA-CANTU began as the result of a request by Gallo to collect a debt owed by OLIVA-CANTU to Gallo. The only reason that Quesada became involved was because Gallo himself owed money to Quesada. Gallo, who was slow in repayment of his own debt, suggested that because OLIVA-CANTU owed him (Gallo) money, Quesada could collect directly from OLIVA-CANTU and thereby receive the money owed. Quesada did not know the reason for the OLIVA-CANTU/Gallo debt.

Quesada insisted that he never transacted any marijuana or cocaine business, either directly or indirectly, with OLIVA-CANTU. Although it was possible that Gallo had sold marijuana to OLIVA-CANTU, which could have

accounted for the OLIVA-CANTU/Gallo debt, Quesada was not involved whatsoever in any supposed transaction. Quesada stated with precision that he did not recall ever speaking with OLIVA-CANTU about acquiring marijuana. No discussions with OLIVA-CANTU were drug related. Quesada characterized his conversations with OLIVA-CANTU as puffery.

At this point in the hearing, the District Judge requested a proffer of the various telephone conversations and hearsay statements at issue. Following the evidentiary portion of the James hearing, the government argued that the evidence showed a wheel conspiracy where Gallo was at the hub and OLIVA-CANTU, Quesada and the others were connected through spokes. OLIVA-CANTU owed money to the hub (Gallo) and it was Quesada's function to collect

it. The defense argued to the court that the evidence did not prove the existence of any conspiracy between Quesada and others and OLIVA-CANTU to possess with intent to distribute cocaine and marijuana. The conversations simply proved that OLIVA-CANTU owed money to Gallo without any evidence that the debt was due to a transaction in controlled substances. The District Court concluded that a conspiracy was shown to exist by independent evidence and that both OLIVA-CANTU and Menchero were members of the conspiracy.

(b) The Menchero/OLIVA-CANTU Trial.

The evidence at trial can be characterized as the introduction of twenty-five tape recordings and transcripts, and the opinion testimony of several law enforcement witnesses.

The government called Quesada, the former principal defendant, who testified under a grant of immunity. The Quesada testimony exonerated OLIVA-CANTU. Of the taped conversations, only four of those involved OLIVA-CANTU as a participant.

Police Officer Raul Martinez testified as to the nature and scope of the criminal investigation against Carlin Quesada which led to the filing of charges against OLIVA-CANTU and others. Martinez, testifying as to his expertise in narcotics investigations, was permitted to explain the meaning of alleged "narcotics jargon" to the jury. Officer Martinez admitted that despite the surveillance of many of the people involved as subjects of the investigation, OLIVA-CANTU was never observed at the Quesada residence and was never seen with anyone who did

appear at Quesada's house.

In addition to the law enforcement testimony regarding the taped conversations and the tapes themselves, the evidence also showed that a search warrant was executed at a residence located at Banyan Drive in Miami on March 24-25, 1978. This home was owned by Gloria Menchero. Gallo and his ex-wife, Menchero, were arrested at that time. The executing police officers found 55 pounds of cocaine and $915,362.77 at the residence. None of this seized property contained OLIVA-CANTU's fingerprints. Menchero stated to the officers that the cocaine belonged to Gallo.

Raul Martinez admitted during his testimony that a state judge had declared that the affidavit prepared by him in support of the wiretap application was unreliable. This order

upset Martinez, who now wanted to vindicate himself.

Carlos Quesada, the former defendant turned immunized government witness, also testified at trial. Quesada openly admitted his background as a drug dealer and recognized that he bought cocaine and marijuana from Rudolfo Rodriguez Gallo in the past. Regarding his relationship with OLIVA-CANTU, Quesada denied that he was ever involved with him in any marijuana or cocaine deals. OLIVA-CANTU was not in the Quesada drug organization. Quesada did try to collect a debt owed by OLIVA-CANTU to Gallo. The only reason for his involvement in the collection process was that Gallo owed Quesada almost $250,000, but Gallo was trying to cheat Quesada out of the money. Consequently, when Quesada demanded from Gallo to be paid his money, Gallo responded that

Quesada ought to collect from OLIVA-CANTU. Quesada assumed that the OLIVA-CANTU/Gallo debt was from a previous marijuana deal, but had no firsthand knowledge that such was the case. Quesada speculated that OLIVA-CANTU had purchased marijuana from Gallo. Quesada also explained that in his telephone conversations with OLIVA-CANTU, he never attempted or intended to reach an agreement to distribute cocaine with OLIVA-CANTU and was not attempting to set up such a transaction.

At the conclusion of the government's case, the defendants renewed their James motion and also requested the entry of a judgment of acquittal on all charges. OLIVA-CANTU argued that there was no proof that he conspired to possess with intent to distribute both marijuana and cocaine. The government responded that the proof

showed that Quesada and Gallo imported marijuana and sold it to others. OLIVA-CANTU was among the purchasers of marijuana from Gallo. The money owed by OLIVA-CANTU was for a purchase of marijuana. There was, the government admitted, no evidence that OLIVA-CANTU had any cocaine dealings with Quesada. The Court, after considering the evidence and argument of counsel, denied OLIVA-CANTU's motions as to Counts 1 and 6, but granted a judgment of acquittal on Count 9.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW AFFIRMING THE TRIAL JUDGE'S REFUSAL, DESPITE THE DEFENSE REQUEST, TO INSTRUCT THE JURY ON THE PERMISSIBLE USE OF CO-CONSPIRATOR HEARSAY EVIDENCE CONFLICTS WITH OTHER APPELLATE DECISIONS AND DEPRIVES OLIVA-CANTU OF DUE PROCESS.

The role of a jury in determining the extent and involvement of a defendant in a criminal conspiracy

has been the subject of substantial judicial discussion since enactment of the Federal Rules of Evidence.[1] At issue has been the meaning of Rule 801(d)(2)(E), which recognizes that a statement is not hearsay if it is offered against a party and is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." The Fifth Circuit took the position in United States v. James, 590 F.2d 575 (5th Cir.)(en banc), cert. denied, 442 U.S. 917 (1975), that it is the obligation of the trial judge to initially determine the admissibility of co-conspirator statements by deciding whether independent evidence of a conspiracy and a particular defendant's role therein had been established. The

---

[1] The Federal Rules of Evidence became effective July 1, 1975. United States v. James, 590 F.2d 575, 578 (5th Cir. 1975).

Ninth Circuit has interpreted Rule 801 somewhat differently, stating in United States v. Giese, 597 F.2d 1170, 1197-1198 (9th Cir.), cert. denied, 444 U.S. 979 (1979), as follows:

> [O]nce the trial court decides that independent evidence, i.e., proof other than co-conspirators acts and declarations, would support a finding connecting the defendant to the conspiracy, 'it is the jury's function to determine whether the evidence, including the [co-conspirators'] declarations, is credible and convincing beyond a reasonable doubt.' Assuming that the court made the initial assessment of whether a prima facie case existed against appellant, it properly instructed the jury that it could rely upon this well-established exception to the rule against the admission of hearsay evidence and consider the acts and declarations of the co-conspirators.

This procedural resolution of the use of co-conspirator testimony does not, however, obviate the need for a thorough instruction to the jury

regarding the permissible use of any co-conspirator statements. That is why, in the case at bar, OLIVA-CANTU timely requested and tendered for the court's consideration two writen charges which cautioned the jury as to the acceptable use of co-conspirator hearsay evidence when evaluating individual guilt. The requested instructions were derived from the Fifth Circuit Pattern Jury Instructions (Offense Instruction 3A and Trial Instruction 2)(June 8, 1978). See also 2 Devitt & Blackmar §27.05. It was the defense position, not accepted by the trial or appellate courts, that the jury, in determining whether OLIVA-CANTU was involved in the charged conspiracy, must first consider only his own acts and statements, and that he could not be bound by the acts and declarations of others until his individual membership in the conspiracy was established.

The appellate court's rejection of this jury instruction issue runs afoul of prior judicial precedent, and is an affront to our system of jurisprudence. In United States v. Whitley, 670 F.2d 617, 621 (5th Cir. 1982), the Fifth Circuit expressly recognized the propriety of the very instructions sought by OLIVA-CANTU:

> The instruction is a variation of the standard jury instruction on proof of membership in a conspiracy. See Devitt and Blackmar §27.05 (3d ed. 1977). James does not destroy the validity or vitality of this instruction. The trial court determines whether to admit statements by co-conspirators as non-hearsay under Fed.R.Evid. 801(d)(2)(E). Once admitted, the jury assesses the weight and credibility of such statements, just as it evaluates all evidence. The court properly charged the jury.

The same instruction was approved by the same court in United States v. Horton, 646 F.2d 181 (5th Cir. 1981). There,

the defendant alleged as error on appeal the failure to give an instruction on the permissible use of co-conspirator hearsay; that defendant did not, however, object to the failure to so instruct. The court recognized the correctness of the instruction, and held that "the trial court could have included such an instruction, [however] its absence did not prejudice either defendant and does not amount to plain error." Id. at 186.

The Eleventh Circuit has apparently taken a different, and we believe incorrect, approach to this issue. The refusal to give the jury guidance as to the proper use of co-conspirator evidence, which evidence is itself highly suspect and of tenuous import, deprived the jury of the ability to meaningfully understand how to analyze the testimony. There is no

doubt that a defendant in a criminal case has an absolute right to demand that the jury be instructed as to all applicable law. E.g., United States v. Ruppel, 666 F.2d 261, 273-274 (5th Cir. 1982); United States v. Pool, 660 F.2d 547, 558 (5th Cir. 1982). This Court must take this opportunity to review this area of legal uncertainty and declare that a defendant in a criminal case is entitled to the conspiracy instructions at issue herein. The prejudice to OLIVA-CANTU by reason of the omission is severe: the jury was very likely tainted in their deliberations by the admittedly illicit activities and conduct of other defendants. Fundamental fairness requires at least that the jury be given proper guidance.

2. THE DECISION BELOW, AFFIRMING THE CONVICTIONS, IS CONTRARY TO PREVAILING LAW AND RESULTS IN A

DEPRIVATION OF OLIVA-CANTU'S CONSTITUTIONAL RIGHTS WHERE THE EVIDENCE DID NOT ESTABLISH OLIVA-CANTU'S CRIMINAL LIABILITY FOR A DUAL OBJECT CONSPIRACY.

OLIVA-CANTU was charged with involvement in a dual object conspiracy, to wit: conspiracy to possess with intent to distribute cocaine and marijuana. The government's trial evidence showed nothing more than that OLIVA-CANTU knew several individuals who were actively involved in the illicit contraband business, that OLIVA-CANTU frequently spoke with those people, and that OLIVA-CANTU had a financial dealing of unknown origin with one of the individuals. The trial proof moreover, coming from the prosecution's immunized "star" witness, was that OLIVA-CANTU never entered into any cocaine conspiracy with any of the alleged conspirators. Yet, on this evidence the

trial court refused to enter a judgment of acquittal and the appellate court affirmed the conviction, thus underscoring the fact that OLIVA-CANTU was convicted on the basis of speculation and innuendo. This result ought not to be allowed.

The law is clear that a defendant can be convicted of a crime only on substantial evidence to prove guilt beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970). In the context of a conspiracy charge, the evidence must be such so as to show each defendant's participation in the common purpose of the conspiracy. United States v. Garcia, 655 F.2d 59, 62 (5th Cir. 1981). Since the actions of OLIVA-CANTU did not show any substantial involvement in the common purpose, e.g., cocaine and marijuana distribution, OLIVA-CANTU cannot be considered

criminally liable.

The government, when arguing for a denial of an acquittal of the charges, admitted that the evidence of OLIVA-CANTU's involvement with cocaine was "weak". There was, as the prosecutor candidly conceded, "no evidence of Carlos Quesada dealing in [cocaine] with OSCAR OLIVA-CANTU." At best, OLIVA-CANTU may have participated in an independent purchase of contraband not related to the illegal compact, which does not make him a knowing member of the conspiracy. United States v. Harbin, 601 F.2d 773, 781-783 (5th Cir.), cert. denied, 444 U.S. 954 (1979). As the Second Circuit stated in United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir. 1974), proof of a conspiracy is sufficient only if the charged members "knew from the scope of the operation that others were involved

in the performance of functions vital to the success of the operation."

Obviously, this could not have been the case, since the government's own witness (Quesada) testified that he was unaware that OLIVA-CANTU ever played a part in his drug organization.

Certiorari review is needed in order to conform this case to applicable law and precedent. OLIVA-CANTU should not be made to suffer for the oversight of the courts below.

3. OLIVA-CANTU WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE PROSECUTOR WAS PERMITTED, OVER DEFENSE OBJECTION, TO SUGGEST TO THE JURY THAT IT IS THE DEFENDANT WHO IS RESPONSIBLE FOR THE COMMUNITY DRUG PROBLEM AND THAT THE DEFENDANT'S CONVICTION IS THE RIGHT START IN THE WAR ON DRUGS.

OLIVA-CANTU was deprived of fundamental fairness when the government was permitted to argue to the jury that the law enforcement fight against

organized narcotics traffickers required the use of every available weapon, thus suggesting that OLIVA-CANTU was responsible as a member of organized crime. Defense counsel promptly objected to this pernicious remark, which served to overly prejudice the case by painting OLIVA-CANTU as an organized narcotics trafficker who was a part of the serious drug problem effecting the South Florida community.

The comments at issue herein were not based on any evidence in the case, but were instead attempts to oversimplify the trial into a battle between good and evil. Obviously, OLIVA-CANTU is not an apologist for whatever evils prevail in society, and cannot be expected to have to suffer as a result of such community problems. By permitting the prosecutor to call on the jury to rectify societal ills, the court

effectively deprived OLIVA-CANTU of his right to a fair trial. In a close case such as this one, the attempt by the prosecutor to draw attention to matters outside the evidence can so prejudice a defendant as to deprive him of due process. United States v. Martinez, 514 F.2d 334, 343 (9th Cir. 1975). The prosecutor's obligation is to do justice, and not simply to win cases. Berger v. United States, 295 U.S. 78, 88 (1935). When the government in closing argument goes outside the bounds of propriety and decency, the resulting verdict can very well be tainted. See generally United States v. Nickerson, 669 F.2d 1016 (5th Cir. 1982); United States v. Garza, 608 F.2d 659 (5th Cir. 1979); United States v. Miranda, 593 F.2d 590 (5th Cir. 1979). This Court should take this opportunity to correct this gross miscarriage of justice by

reviewing the affirmance entered by the appellate court.

4. **A DEFENDANT IN A CRIMINAL CASE CANNOT BE SENTENCED TO A TERM WHICH EXCEEDS THE MAXIMUM ALLOWABLE PUNISHMENT.**

In situations where the government alleges the existence of a dual object conspiracy and the various objects are punishable by differing terms of incarceration, it is incumbent for the trial court to sentence the defendant only for that object which was sufficiently proved. In this case, the government at best established OLIVA-CANTU's participation in the marijuana object, and not a cocaine conspiracy. The jury's guilty verdict is understandable only in this context; yet, OLIVA-CANTU received a sentence which exceeded the lawful maximum for a marijuana offense.

The approval of a general verdict of guilty runs afoul of the law requiring definiteness of verdicts. In multi-object conspiracies, special verdict forms are needed to insure correct sentencing. E.g., United States v. Colson, 662 F.2d 1389 (11th Cir. 1981)(multiple object conspiracy is only subject to one sentence); United States v. Gomez-Geraldo, 652 F.2d 452 (5th Cir. 1981); United States v. Murray, 618 F.2d 892 (2d Cir. 1980); United States v. Starks, 515 F.2d 112 (3d Cir. 1975). Because the verdict in this case suffers from a lack of definiteness, this Court ought to remedy the defect by mandating correction of the sentence. The interests of justice require that such a result be reached.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

Donald I. Bierman

DONALD I. BIERMAN
Counsel of Record

BENEDICT P. KUEHNE

BENEDICT P. KUEHNE

BIERMAN, SONNETT, BEILEY
& SHOHAT, P.A.
Suite 500
200 S.E. 1st Street
Miami, Florida 33131
(305 358-7477

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of July 1982, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, D.C. 20530, and by hand to the United States Attorney's Office, 155 S. Miami Avenue, Miami, Florida 33130. A single copy was delivered by mail to the following counsel: Robyn Herman, Federal Public Defender's Office, 14 Northeast 1st Avenue, Suite 500, Miami, Florida 33132; Thomas Murray, Esq., 3050 Biscayne Boulevard, Miami, Florida 33137; Donald Ferguson, Esq., 2915 Southwest 27th Avenue, Miami, Florida. I FURTHER CERTIFY that all parties required to be served have been served.

BENEDICT P. KUEHNE

BENEDICT P. KUEHNE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 80-5530

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GLORIA MENCHERO and
OSCAR OLIVA-CANTU,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

---

(April 26, 1982)

Before TUTTLE, FAY and JOHNSON, Circuit Judges

PER CURIAM: AFFIRMED. See Circuit Rule 25.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-5530

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR OLIVA-CANTU,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITIONS FOR REHEARING
(JUNE 8, 1982)

Before TUTTLE, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

United States Circuit Court Judge

Office - Supreme Court, U.S.
FILED
SEP 16 1982
ALEXANDER L. STEVAS
CLERK

No. 82-114

In the Supreme Court of the United States

OCTOBER TERM, 1982

OSCAR OLIVA-CANTU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
JOHN F. DE PUE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the trial judge correctly instructed the jury concerning the weight it could accord the declarations of co-conspirators.

2. Whether the evidence was sufficient to support petitioner's conviction and sentence on a count alleging a conspiracy to distribute both cocaine and marijuana.

3. Whether the prosecutor's closing remarks were proper.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Berenyi v. *Immigration Director*, 385 U.S. 630	6
Carbo v. *United States*, 314 F.2d 718, cert denied, 377 U.S. 953	5, 6
Glasser v. *United States*, 315 U.S. 60	6
United States v. *Bolts*, 558 F.2d 316, cert. denied, 439 U.S. 898	8
United States v. *Giese*, 597 F.2d 1170, cert. denied, 444 U.S. 979	5, 6
United States v. *Harbin*, 601 F.2d 773	8
United States v. *Horton*, 646 F.2d 181, cert. denied, No. 81-599 (Nov. 2, 1981)	6
United States v. *James*, 576 F.2d 1121, modified en banc, 590 F.2d 575, cert. denied, 442 U.S. 917	4, 5
United States v. *Nixon*, 418 U.S. 683	5
United States v. *Petrozziello*, 548 F.2d 20	5
United States v. *Praetorius*, 622 F.2d 1054, cert. denied, 449 U.S. 860	9
United States v. *Reliable Transfer Co.*, 421 U.S. 397	6
United States v. *Schaffer*, 600 F.2d 1120	9
United States v. *Sindona*, 636 F.2d 792, cert. denied, 451 U.S. 912	9
United States v. *Stanchich*, 550 F.2d 1294	5
United States v. *Trowery*, 542 F.2d 623, cert. denied, 429 U.S. 1104	5
United States v. *Whitley*, 670 F.2d 617	5, 6

Statutes and rules: Page

21 U.S.C. 843(b) 2
21 U.S.C. 846 2

Fed. R. Evid.:
Rule 104(a) 5
Rule 801(d)(2)(E) 3, 4-5

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-114

OSCAR OLIVA-CANTU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals (Pet. App.) is reported at 677 F.2d 116.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1982. A petition for rehearing was denied on June 8, 1982. The petition for a writ of certiorari was filed on July 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner and Gloria Menchero were convicted of conspiring to possess with intent to distribute marijuana and cocaine, in violation of

21 U.S.C. 846.[1] Petitioner was also convicted of using a telephone to facilitate drug distribution, in violation of 21 U.S.C 843(b). He was sentenced to nine years' imprisonment on the conspiracy count to be followed by a three-year term on the telephone facilitation count, and was fined $30,000.

1. The evidence at trial showed that petitioner participated in a large-scale narcotics distribution scheme involving, among others, Carlos Quesada and co-defendants Menchero, Rodriquez Gallo, and Jose Piniero. Between November 1977 and April 1978, Gallo sold large quantities of drugs to petitioner, Quesada and others in the Miami, Florida area. In addition to purchasing cocaine from Gallo, Quesada joined Gallo in a venture involving the importation of a large quantity of marijuana. Gallo sold 14,000 pounds of this marijuana to petitioner and assigned $20,000 of the amount owed to him as the result of this purchase to Quesada (Tr. 909, 916-918, 922, 944, 945).[2]

During this period, local police officers monitored calls made to and from Quesada's residence pursuant to an interception order issued by a state judge.[3] Many of the calls involved Quesada's efforts to locate petitioner in order to collect the marijuana debt (*e.g.*, Tr. of Calls 563, 565, 631, 681, 1069, 1248). Other calls, which typically employed code words used by drug traffickers, involved orders for quantities of cocaine or arrangements to distribute the substance (*e.g.*, Tr. 550, 668, 673; Tr. of Calls 79, 148, 1085). For ex-

---

[1] The indictment charged a total of eight defendants, including petitioner, with various drug-related offenses. Prior to trial, the indictment was dismissed against three defendants. Charges against Carlos Quesada were dismissed when he agreed to testify as a government witness. Petitioner and three co-defendants—Menchero, Rodriguez Gallo, and Jose Piniero—were to be tried together in March 1980, but a severance was granted as to Gallo and Piniero. Both Gallo and Piniero eventually were convicted of conspiracy to distribute drugs (21 U.S.C. 846) and use of the telephone to facilitate the scheme (21 U.S.C. 843(b)). Piniero's petition for a writ of certiorari (No. 81-6972) is now pending before this Court.

[2] "Tr." refers to the trial transcript. Citations to the trial transcript were derived from the government's brief filed in the court of appeals.

[3] The propriety of the issuance of this interception warrant is addressed in our Brief in Opposition to No. 81-6972.

ample, on March 11, 1978, in response to an inquiry by petitioner as to whether Quesada could help him meet a "commitment," Quesada responded that he had half a "big wheel" of cocaine (Tr. of Call 681 at 8, 16-17). On March 21, 1978, Quesada informed Piniero that a load of cocaine would be arriving on Wednesday, that Gallo had told him two or three kilos were due to go to petitioner, but that he had advised Gallo that petitioner should first be required to pay his other debts (Tr. 244, 631-633; Tr. of Call 1069 at 3-4). On March 23, 1978, petitioner advised Quesada that he had left a quantity of drugs at his son's house (Tr. 637-639; Tr. of Call 1204 at 1). And, on March 24, 1978, Quesada was overheard telling Gallo that he had finally contacted petitioner and that petitioner had a quantity of drugs. During that conversation, Piniero came on the line and interjected that petitioner had told him that petitioner would be delivering a "window" of cocaine (Tr. 644-657; Tr. of Call 1248 at 2-3).

Later that day, Quesada placed a call to the residence of Menchero. Gallo answered the call and, in response to Quesada's query, stated "its here" (Tr. 650-651; Tr. of Call 1264 at 1). Upon hearing this, police officers obtained a warrant authorizing a search of the Menchero home. During the execution of the warrant, Menchero led the officers to a closet that contained 55 pounds of cocaine valued at approximately $20 million (Tr. 680-681, 687, 699, 704-705).

2. At the beginning of trial, the court conducted a hearing outside the presence of the jury to determine whether there was sufficient independent evidence that a conspiracy existed and that each of the defendants was a participant in that conspiracy to warrant the admission into evidence of the extra-judicial statements made by them. Fed. R. Evid. 801(d)(2)(E). To establish petitioner's participation in the conspiracy, the government presented Quesada's testimony that he and Gallo had imported a large shipment of marijuana, that Gallo owed him $20,000 for his participation in the scheme, and that Gallo had instructed him to collect this amount from petitioner (Tr. 208-210, 216, 219, 225-227). In addition, the government introduced four tape recordings of intercepted calls between Quesada and

petitioner and the explanatory testimony of the narcotics officer who monitored them and was conversant with the code terms typically used by drug dealers (Tr. 131-164; Exhs. 1-4). The calls involved Quesada's efforts to collect the marijuana debt from petitioner (*e.g.* Tr. 137, 142; Tr. of Call 613 at 1, 3, 16-17) as well as other drug-related topics (including a solicitation of cocaine by petitioner and a statement that petitioner had left a quantity of drugs with his son for Quesada to pick up) (Tr. of Call 631 at 8; Tr. of Call 1204 at 1-2).

At the close of this evidence, the trial judge ruled that independent evidence sufficiently established that petitioner was a participant in the conspiracy. Accordingly, he admitted not only the four intercepted conversations to which petitioner was a party, but also conversations between the other co-conspirators that implicated him in the drug distribution scheme. Fed. R. Evid. 801(d)(2)(E).

ARGUMENT

1. At the conclusion of trial, petitioner requested the court to instruct the jury that, in determining whether a defendant was a participant in a conspiracy, it should consider only evidence relating to his own acts or statements, and that it could not rely upon the declarations of other participants unless his involvement in the conspiracy was first established by such evidence beyond a reasonable doubt (Pet. 24). Petitioner contends (*id.* at 21-27) that the trial court erred in refusing to give the requested instruction. This claim is totally without merit.

The trial court correctly admitted into evidence the out-of-court statements of petitioner's co-conspirators. Fed. R. Evid. 801(d)(2)(E).[4] Once admitted, that evidence was properly considered by the jury in ascertaining petitioner's guilt. As the court explained in *United States* v. *James*, 576 F.2d 1121, 1130 (5th Cir. 1978), modified en banc, 590 F.2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979), "Rule

[4] Fed. R. Evid. 801(d)(2)(E) provides:

> A statement is not hearsay if *** [t]he statement is offered against a party and is *** a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

104(a) [of the Federal Rules of Evidence] [5] requires that the judge alone make the threshold determination of the admissibility of the evidence. The jury is to play no role in determining the admissibility of [co-conspirator's] statements" (576 F.2d at 1130; footnote omitted). Thus, under Rule 104(a), "[i]f the court is satisfied that the statements [of co-conspirators] are admissible, then they are to be considered by the jury along with the other competent evidence in determining the defendant's guilt or innocence. 'To accept the problem as one of admissibility of evidence is to recognize that the declarations, if admissible, shall be considered by the jury *in reaching* its determination upon the issue of innocence or guilt'" (576 F.2d at 1132, quoting *Carbo* v. *United States*, 314 F.2d 718, 736 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964) (emphasis in the original)). See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 701 n.14 (1974); *United States* v. *Giese*, 597 F.2d 1170, 1197-1198 (9th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Stanchich*, 550 F.2d 1294, 1297-1298 (2d Cir. 1977); *United States* v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977); *United States* v. *Trowery*, 542 F.2d 623, 626-627 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977). Indeed, as the court recognized in *Carbo* v. *United States*, *supra*, 314 F.2d at 736, were the rule to the contrary, so as to require the jury to be satisfied beyond a reasonable doubt of the defendant's position as a co-conspirator before considering the inculpatory statements of alleged co-conspirators, "there [would be] no occasion ever to resort to the declarations at all."

The authorities upon which petitioner relies lend no support to his claim of error. In *United States* v. *Whitley*, 670 F.2d 617, 621 (5th Cir. 1982), the court held that "[t]he trial court determines whether to admit statements by co-conspirators as nonhearsay under Fed. R. Evid.

---

[5] Fed. R. Evid. 104(a) provides:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

801(d)(2)(E). Once admitted, the jury assesses the weight and credibility of such statements, just as it evaluates all evidence."[6] In *United States* v. *Horton*, 646 F.2d 181, 186 (5th Cir.), cert. denied, No. 81-599 (Nov. 2, 1981), the court, noting the rescission of a Fifth Circuit pattern instruction that would have precluded the jury from considering the statements of alleged co-conspirators until after they were satisfied the defendant was a member of the conspiracy, held that it was not prejudicial error to have omitted the instruction. And, as petitioner concedes (Pet. 23), in *United States* v. *Giese*, *supra*, 597 F.2d at 1197-1198, the court expressly held that, "[o]nce the trial court decides that independent evidence * * * would support a finding connecting the defendant to the conspiracy, 'it is the jury's function to determine whether the evidence, including the [co-conspirators'] declarations, is credible and convincing beyond a reasonable doubt'" (quoting *Carbo* v. *United States*, *supra*, 314 F.2d at 737).

2. Petitioner also contends (Pet. 27-31) that the evidence was insufficient to support his conviction on the conspiracy count, which alleged a scheme to possess with intent to distribute both marijuana and cocaine. This fact-bound question, resolved against petitioner by both courts below,[7] warrants no further review by this Court. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). In any event, when the evidence is considered in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), there can be no question but that it fully supports his conviction on the conspiracy count.

---

[6] As a result, the *Whitley* court found that it was not prejudicial error for the trial judge to instruct the jury that it could not consider the statements of alleged co-conspirators against the defendant until it had first concluded from the defendant's own acts and statements that he was a member of the conspiracy (670 F.2d at 621). We do not agree with the court's dictum, however, that such an instruction has continuing vitality following enactment of the Federal Rules of Evidence (*ibid.*).

[7] By affirming petitioner's conspiracy conviction the court of appeals rejected his sufficiency claim, and the trial judge denied his motion for a judgment of acquittal.

With respect to the marijuana branch of the drug conspiracy, Gallo instructed Quesada to look to petitioner for payment of his (Quesada's) share of the proceeds from their marijuana importing venture. Quesada testified that petitioner had purchased 14,000 pounds of marijuana imported by Quesada and Gallo and had incurred a $20,000 debt as the result of this transaction (Tr. 916-917, 944).

The evidence relating to petitioner's participation in the cocaine distribution component of the scheme is equally compelling. During one monitored telephone conversation with Quesada, petitioner stated that he had dropped a "very pretty thing" off at the home of his son, and that Quesada should stop off there (Tr. of Call 1204 at 1). On another occasion, during a three-way conversation between Quesada, Gallo and Piniero, Piniero stated that petitioner told him that he was "going to go by there with one more little window" for Quesada but that he would be unable to obtain enough for everyone (Tr. of Call 1248 at 2-3). During a third conversation, petitioner told Quesada that one of the reasons he wanted to speak to him was that petitioner had just made a drug commitment with one of his partners. Quesada responded "I have * * * for a guy * * * one half a big wheel Chico" (Tr. of Call 631 at 8). Quesada also explained that he had supplied three big "apparatus," or three "pretty ones" to another dealer and that he anticipated making a substantial profit on the deal (*id.* at 17). Finally, during a conversation of March 21, 1978, which involved the continuing efforts of Piniero and Quesada to obtain payment from petitioner, Quesada stated that Gallo had agreed to furnish petitioner "two or three suits" that were due to arrive shortly (Tr. of Call 1069 at 3). A narcotics officer testified that, in drug parlance, the terms "pretty one," "window," "apparatus," "big wheel" and "suits" all refer to quantities of cocaine (Tr. 612, 614-615, 632-633, 638-639, 647-648). From these conversations and the officer's explanations, the jury could clearly infer that petitioner was

dealing in cocaine as well as in marijuana,[8] that he had furnished the substance to both Gallo and Quesada, and that he looked to Quesada to furnish him with cocaine to meet his commitments to others. See *United States* v. *Harbin*, 601 F.2d 773, 782 (5th Cir. 1979).[9]

3. Finally, petitioner claims (Pet. 31-34) that the prosecutor made two remarks during closing arguments that improperly suggested that he was connected to organized crime. The challenged remarks, however, were permissible in the context of this case.

During closing argument, the prosecutor explained to the jury that persons engaged in drug dealing do not discuss their activities openly in their telephone conversations with one another. In particular, he stated that "when you have an agreement and especially in narcotics, in the underworld of narcotics, these people in person and on the telephone, especially on the telephone, do not say, let's say, between Rudolfo Rodriguez and Carlos Quesada—they do not say Rudolfo, how would you like to sell me 20,000 pounds of marijuana?" (Tr. 1156).

---

[8] Petitioner observes (Pet. 28) that, at one point, Quesada denied dealing in cocaine or marijuana with him (Tr. 915). In view of the clear import of the intercepted telephone conversations, the substance of which Quesada testified that he could not recall (Tr. 946), the jury had a fully sufficient basis upon which to reject this testimony.

[9] In light of this evidence there is no merit to petitioner's argument (Pet. 34-35) that his sentence was excessive because it exceeded the maximum authorized for participation in a conspiracy limited to possession with intent to distribute marijuana. As we have shown, the evidence did, in fact, demonstrate petitioner's involvement in the cocaine component, as well as in the marijuana component, of the conspiracy. More importantly, however, whether the jury found or could have found that he participated in this particular object of the conspiracy is inconsequential. As explained in *United States* v. *Bolts*, 558 F.2d 316, 325-326 (5th Cir. 1977), cert. denied, 439 U.S. 898 (1978), "where the indictment charge[s] a conspiracy to commit violations of several related statutory [drug] provisions in what was essentially one narcotics trafficking enterprise, it was *** enough that the jury found that [the defendant] knowingly and intentionally was a member of the conspiracy. The theory of vicarious liability *** exposed him to the maximum sentence for which any of the conspirators could be charged under the conspiracy count."

During his closing argument, counsel for petitioner compared the tactics of the police officer who conducted the surveillance of Quesada's telephone with those of a member of the Iranian secret police (Tr. 1121). On rebuttal, the prosecutor responded (Tr. 1155-1156) that this statement was tantamount to an assertion that the police should not fight drug trafficking through clandestine means. He stated that "the police are not supposed to hide their heads in the sand. They are out there trying to stop narcotics in this case the wiretap is an attempt to do that" (*ibid.*).

Neither of the remarks decried by petitioner either mention him or exceed the limits of proper argument. The first statement was nothing more than an explanation, fully supported by the testimony of both Quesada and the officer who supervised the interceptions, that drug dealers employ coded language and the jurors should therefore look beyond the literal meaning of the words used during the conversations. The prosecutor's second statement was a "fair reply" to the insinuation by petitioner's attorney that law enforcement officials had engaged in police state tactics. See, *e.g.*, *United States* v. *Sindona*, 636 F.2d 792, 806 (2d Cir. 1980), cert. denied, 451 U.S. 912 (1981) (when integrity of prosecution attacked, responsive retort proper); *United States* v. *Praetorius*, 622 F.2d 1054, 1060-1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980) (when defense attacks conduct of government's agents, prosecutor entitled to reply with suitable rebutting language); *United States* v. *Schaffer*, 600 F.2d 1120, 1122-1123 (5th Cir. 1979) (prosecutor's statement "fair reply" to defendant's argument). And, even if the prosecutor's remarks could be construed as an insinuation that petitioner was involved in extensive drug dealings and was associated with known traffickers, that is precisely what the government's evidence showed. Accordingly, when viewed in the context of the evidence and the arguments at trial, the prosecutor's remarks were in no way improper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
JOHN F. DE PUE
Attorney

SEPTEMBER 1982